Supreme Court, U.S.
FILED

No. 94 1133 JAN 12 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

PETITION FOR A WRIT OF CERTIORARI

MERTON G. HENRY
Counsel of Record
NICHOLAS S. NADZO
JAMES N. KATSIAFICAS
EMILY A. BLOCH
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a local police power ordinance enacted in compliance with federal and state law, directing a town's municipal solid waste to a designated regional waste-to-energy facility, is permissible under the Commerce Clause.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	14
I. PRINCIPLES OF FEDERALISM DEMAND THAT THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE BE EXEMPT FROM THE REACH OF THE COMMERCE CLAUSE	15
II. THE COMMERCE CLAUSE IS INAPPLICABLE TO THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE	18
III. IF THE COMMERCE CLAUSE DOES APPLY TO THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE, THE LESSER STANDARD OF SCRUTINY UNDER *PIKE v. BRUCE CHURCH* IS THE APPROPRIATE TEST	22
IV. LOWER COURTS ARE DEEPLY DIVIDED ON WHETHER THE COMMERCE CLAUSE ALLOWS MUNICIPALITIES TO TAKE RESPONSIBILITY UNDER THEIR POLICE POWERS FOR LONG-TERM PLANNING OF SOLID WASTE MANAGEMENT	25
V. THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE PRESENTS A MORE COMPELLING CASE TO UPHOLD SUCH AN ORDINANCE THAN DOES THAT OF CLARKSTOWN	27
CONCLUSION	28

TABLE OF AUTHORITIES

CASES — Page

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 22
California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 17
Container Corp. of Carolina v. Mecklenburg County, No. 92 Cv-154-MV (W.D.N.C. June 14, 1992) 26
DeVito v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991), *aff'd.* 947 F.2d 1004 (1st Cir. 1991) 26
In re Fiorillo Bros., 577 A.2d 1316, *cert. denied* 585 A.2d 371 (1990) 25
J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envtl. Protection, 857 F.2d 913 (3rd Cir. 1988) 23, 25
Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources, 504 U.S. ——, 112 S.Ct. 2019 (1992) 21, 22
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 15, 16, 17
Gardner v. Michigan, 199 U.S. 325 (1905) 17
Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992) 22
Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) 25
Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) 21
Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 21, 23
Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981) 17, 25
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 23, 24
Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 24
Maine v. Taylor, 477 U.S. 131 (1986) 21, 24
National League of Cities v. Usery, 426 U.S. 823 (1976) 16, 17
Philadelphia v. New Jersey, 437 U.S. 617 (1978) .. 21, 22

TABLE OF AUTHORITIES—Continued

Page

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 24, 25
School Committee of Town of York v. Town of York, 626 A.2d 935 (Me. 1993) 18
Sporhase v. Nebraska, 458 U.S. 941 (1982) 24
Town of Clarkstown v. C.A. Carbone, Inc., 587 N.Y.S.2d 681 (1992), *cert. granted*, 126 L.Ed.2d 369, 62 U.S.L.W. 3334 .....15, 25, 27
Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Systems, Inc., No. CUM-93-45, Decision No. 6654 (Me. Oct. 15, 1993) 13, 22
Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993) 22, 26
Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1991) 13, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, cl. 3 2
U.S. Const. amend. X 2, 14
Me. Const. art. VIII, pt. 2, sec. 1 .....6, 9, 18

STATUTES

Federal Statutes

28 U.S.C.A. § 1257(a) (West 1993) 2
28 U.S.C.A. § 2403(b) (West 1978) 9
42 U.S.C.A. § 6901(a) (West 1983) 2, 17, 19
42 U.S.C.A. § 6901(b)(8) (West Supp. 1993) 20
42 U.S.C.A. § 6943(a)(5) (West 1983) 3, 19

Maine Statutes

30-A M.R.S.A. § 3001 (West Supp. 1993) 3, 9, 18
38 M.R.S.A. § 1305(1) (West 1989) 4, 7, 8, 27
38 M.R.S.A. § 1305(1) (West Supp. 1993) 4, 8
38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993) 4, 9, 18, 27
38 M.R.S.A. § 2101-2236 (West Supp. 1993) 9
38 M.R.S.A. § 2101 (West Supp. 1993) 4, 9, 23
38 M.R.S.A. § 2132(1) (West Supp. 1993) 5, 10, 27
38 M.R.S.A. § 2204 (West Supp. 1993) 5, 10, 27

TABLE OF AUTHORITIES—Continued

Statutes from Other Jurisdictions	Page
Colorado (Colo. Rev. Stat. § 30-20-107)	19
Connecticut (Conn. Gen. Stat. § 22A-220A)	19
Delaware (Del. Code Ann. tit. 7, § 6406(31))	19
Florida (Fla. Stat. Ann. § 403.713)	19
Hawaii (Haw. Rev. Stat. § 340A-3(a))	19
Illinois (Ill. Ann. Stat. ch. 65, para. 5/11-19-1)	19
Indiana (Ind. Code §§ 36-9-31-3 & -4)	19
Iowa (Iowa Code § 28G.4)	19
Louisiana (La. Rev. Stat. 30:2307(9))	19
Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-B(2))	19
Mississippi (Miss. Code Ann. § 17-17-319)	19
Missouri (Mo. Rev. Stat. § 260.202)	19
New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5)	19, 20
New York (1991 N.Y. Laws ch. 569, at 1687-89)	20
North Carolina (N.C. Gen. Stat. § 130A-294)	20
North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8))	20
Ohio (Ohio Rev. Code Ann. § 343.01(H)(2))	20
Oregon (Or. Rev. Stat. § 268.317(3) & (4))	20
Pennsylvania Pa. Stat. Ann. tit. 53, § 4000.303 (e))	20
Rhode Island (R.I. Gen. Laws § 23-19-10(40))	20
Tennessee (Tenn. Code Ann. 68-211-814)	20
Vermont (Vt. Stat. Ann. tit. 24, §§ 2003a, 2203b)	20
Virginia (Va .Code Ann. § 15.1-28-01)	20
Washington (Wash. Rev. Code § 36.58.040, 35.21.210)	20
West Virginia (W. Va. Code § 16-26-16)	20
Wisconsin (Wis. Stat. § 159.13(3), (11))	20

TREATISES AND ARTICLES

O'Reilly, *State & Local Government Solid Waste Management*, § 1:03	17
McQuillin, *The Law of Municipal Corporations* (3d ed.) § 24.242 and § 24.245	17

MISCELLANEOUS

Town of Gray, Maine Flow Control Ordinance	*passim*

TABLE OF AUTHORITIES—Continued

Page

Feasible Solid Waste Disposal Alternatives for Greater Portland/Cumberland County, Maine Report of Joint Greater Portland Council of Governments/RWS Solid Waste Management Policy Comm. (1983) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. —

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Decision of the Maine Supreme Judicial Court was rendered on October 15, 1993. That Decision is recorded at No. CUM-93-45, Decision No. 6654, (Me. Oct. 15, 1993), is now reported at 632 A.2d 134 (Me. 1993) and is reproduced at pages 1a-6a of the appendix to this petition ("Pet. App.").

The Order of the Maine Superior Court (Cumberland County) granting Petitioners' Motion for Summary Judgment was rendered on January 26, 1993, is unreported and is reproduced at Pet. App. 8a-10a.

The transcript from the January 12, 1993 hearing on Petitioners' Motion for Summary Judgment in the Maine

Superior Court (Cumberland County) is unreported and is reproduced at Pet. App. 11a-46a.[1]

JURISDICTION

The Decision of the Maine Supreme Judicial Court was issued on October 25, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Art. I, sec. 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .".

2. The Tenth Amendment to the United States Constitution, amend. X, provides:

   "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Resource Conservation Recovery Act ("RCRA")

   a. 42 U.S.C.A. § 6901(a)(4) (West 1983) provides that:

      The Congress finds with respect to solid waste— . . . that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and applica-

[1] All parties to the proceeding below are listed in the caption. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

tion of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

b. 42 U.S.C.A. § 6943(a)(5) (West 1983) provides that:

> In order to be approved under Section 6947 of this title, each State plan must comply with the following minimum requirements— . . . The plan shall provide that no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

4. The Maine home rule statute, 30-A M.R.S.A. § 3001 (West Supp. 1993), provides:

> Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
>
> 1. Liberal Construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
>
> 2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.
>
> 3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power

granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

4. Penalties accrue to municapility. All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

5. The Maine flow control enabling legislation, 38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993), is reproduced at Pet. App. 66a-74a.

6. The Maine solid waste disposal mandate statute, 38 M.R.S.A. § 1305(1) (West 1989), prior to 1989 read as follows:

> Disposal facilities. Each municipality shall provide a solid waste disposal facility for domestic and commercial solid waste generated within the municipality and may provide such a facility for industrial wastes and sewage treatment plant sludge.

Subsequent to 1989, § 1305(1) (West Supp. 1993) reads:

> Disposal services. Each municipality shall provide solid waste disposal services for domestic and commercial solid waste generated within the municipality and may provide these services for industrial wastes and sewage treatment plant sludge.

7. The State solid waste management hierarchy statute, 38 M.R.S.A. § 2101 (West Supp. 1993), reads:

1. Priorities. It is the policy of the State to plan for and implement an integrated approach to solid waste management, which shall be based on the following order of priority:

A. Reduction of waste generated at the source, including both amount and toxicity of the waste;

B. Reuse of waste;

C. Recycling of waste;

D. Composting of biodegradable waste;

E. Waste processing which reduces the volume of waste needing land disposal, including incineration; and

F. Land disposal of waste.

8. The Maine solid waste recycling goals statute, 38 M.R.S.A. § 2132(1) (West Supp. 1993), reads:

1. State recycling goal; interim goal. It is the policy of the State to recycle, by January 1, 1994, 50% of the municipal solid waste generated each year. The Legislature establishes an interim goal of recycling, by January 1, 1992, 25% of the municipal solid waste generated each year.

9. The Maine municipal disposal surcharge; recycling and import fees statute, 38 M.R.S.A. § 2204 (West Supp. 1993), reads:

The agency shall impose the following fees.

1. Landfill surcharge. A disposal surcharge of $4 per ton is assessed on any municipal solid waste disposed of by landfilling at a commercial landfill facility.

2. Recycling progress. Any municipality that fails to make reasonable progress, as determined by the agency, toward the state recycling goals shall pay a $1.50 per ton fee on:

A. Any solid waste generated within its jurisdiction that is exported from the State; and

B. Any solid waste generated within its jurisdiction that is delivered to a commercial solid waste facility or to a solid waste disposal facility owned by the agency or a regional association, except tires disposed of in a manner other than landfilling.

3. Imported municipal solid waste. To support those regulatory and administrative costs associated with imported municipal solid wastes, an administrative fee of $4 per ton is assessed on any municipal solid waste originating outside the State and delivered to a commercial solid waste disposal facility or solid waste disposal facility owned by the agency or a regional association for disposal.

10. The Maine Constitution's home rule provision, Me. Const. art. VIII, pt. 2, sec. 1, reads:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

11. The Town of Gray, Maine's Solid Waste, Flow Control and Recycling Ordinance ("Flow Control Ordinance") is reproduced at Pet. App. 47a-65a.

STATEMENT OF THE CASE

This case presents a waste hauler's challenge under the dormant Commerce Clause to the validity of Petitioner Town of Gray's (the "Town") Solid Waste, Flow Control and Recycling Ordinance (the "Flow Control Ordinance"). The Flow Control Ordinance requires all solid waste generated within the Town to be disposed of—either directly or through the Town's transfer station—at a waste-to-energy facility (the "Facility") owned and operated by Petitioner Regional Waste Systems, Inc. ("RWS") located in Portland, Maine. RWS is a non-capital stock, non-profit corporation composed of twenty-one Maine municipalities (the "Member Municipalities")[2] for the purpose of providing them and ten asso-

[2] RWS' Member Municipalities include the following: Bridgton, Cape Elizabeth, Casco, Cumberland, Falmouth, Freeport, Gorham,

ciate member municipalities with a long-term, environmentally advanced method for meeting their state-mandated solid waste disposal and management obligations.[3]

A. Background

Between 1973 and 1989, Maine's Legislature directed that each municipality provide solid waste disposal facilities for the waste generated within its boundaries. In 1973, the Legislature enacted P.L. 1973, c. 387, which stated that each Maine "municipality shall provide a solid waste disposal facility for domestic and commercial solid waste generated within the municipality . . . ;" this Maine Public Law is codified in part at 38 M.R.S.A. § 1305(1) (West Supp. 1993). The statement of fact to the Legislative Document that was enacted as P.L. 1973, c. 387, reads in pertinent part: "This Act also requires municipalities to assume responsibility for the orderly disposal of solid waste except that generated by industry and waste water treatment sludge." *See* L.D. 1903, Statement of Fact (106th Maine Legislature 1973). Pet. App. 75a-81a. For the next sixteen years, § 1305(1) remained

---

Gray, Harrison, Hollis, Limington, Lyman, North Yarmouth, Ogunquit, Portland, Pownal, Scarborough, South Portland, Waterboro, Windham and Yarmouth.

[3] Prior to commencement of operations of the Facility, landfilling was the primary means of solid waste disposal for all the Member Municipalities. Currently, through RWS, the Member Municipalities have initiated a comprehensive solid waste management plan, providing not only cogeneration at the Facility, but also recycling services with containers owned and collected by RWS and available in all the Member Municipalities, landfilling for by-pass waste at a landfill owned by RWS, disposal of ash residue from the Facility at an ashfill owned by RWS, composting of yard waste from Member Municipalities, undertaking of a sludge disposal facility in conjunction with the City of South Portland and the Portland Waster District (which services the majority of Member Municipalities), and providing educational services for schools and community organizations.

unchanged and mandated that each municipality provide a solid waste disposal facility.[4] During the time that this mandate existed, the Member Municipalities studied the need for a regional solid waste disposal facility, and constructed the Facility in order to meet the mandate of § 1305(1).[5]

The Town adopted the predecessor ordinance to the Flow Control Ordinance as a condition of its participation in RWS and to help ensure the viability of the Facility. The Facility, which began operation in 1988, relies upon approximately $105 million in revenue bonds issued by RWS, which are repaid from revenues resulting from the sale of electricity and from tipping fees paid by Member Municipalities, associate member municipalities and by commercial waste haulers for the disposal of solid waste.

An essential precondition to the availability of sufficient tipping fee revenue and electrical generation revenue is a reliable supply of solid waste as fuel. Therefore,

---

[4] In 1989, § 1305(1) was amended so that each municipality's obligation now is to provide "disposal services" rather than a "disposal facility." *See* P.L. 1989 c. 585, § 17, codified at 38 M.R.S.A. § 1305(1) (West Supp. 1993).

[5] The Member Municipalities and RWS decided to construct the Facility only after lengthy and careful evaluation of alternative solid waste disposal methods to determine which would best promote the local public health and environmental interests. *See*, Feasible Solid Waste Disposal Alternatives for Greater Portland/Cumberland County, Maine, Report of Joint Greater Portland Council of Governments/RWS Solid Waste Management Policy Comm. (1983). This report concludes, based on "a careful evaluation of both resource recovery and nonresource recovery systems," that resource recovery (waste-to-energy) is "economically and environmentally preferable [to] all the practical resource recovery and nonresource recovery solid waste alternatives practically available" *Id.* at 1-1 through 1-3. The same report further concludes that "[c]ontrol over the supply of waste to a resource recovery facility or other capital intensive solid waste disposal system is essential to facility development." *Id.* at 2-17.

RWS entered into a Waste Handling Agreement with each Member Municipality requiring each municipality to pledge all of the "Acceptable Waste" (defined in Section II of the Flow Control Ordinance in part as "ordinary household, municipal, institutional, commercial and industrial solid waste") generated within its borders to RWS (and to such facility as RWS may designate). Pet. App. 49a. The Waste Handling Agreement also requires each municipality to adopt a solid waste flow control ordinance designating the Facility as the disposal facility for all such Acceptable Waste. Thus, in 1985, consistent with this requirement of the Waste Handling Agreement and with a Maine statute (38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993)) authorizing enactment of flow control ordinances, the Town adopted its first flow control ordinance.[6]

Pursuant to its statutory home rule authority under Me. Const. art. VIII, pt. 2, sec. 1 and 30-A M.R.S.A. § 3001 (West Supp. 1993) and in response to the Maine Legislature's adoption of state recycling goals and to the escalating local cost of solid waste management, the Town in 1992 replaced its initial flow control ordinance.[7]

---

[6] In accordance with Rule 29.4(c), Petitioners note that this case could be viewed as drawing the constitutionality of a Maine state statute into question and that 28 U.S.C.A. § 2403(b) (West 1978) may be applicable. The statute involved is enabling legislation, 38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993), to adopt local flow control ordinances.

[7] In 1987, Maine's Legislature enacted a system of statewide solid waste management (P.L. 1987, c. 517), and in 1989, it established a state administrative agency, the Maine Waste Management Agency, to oversee local and regional solid waste management efforts. The legislation establishing that agency (P.L. 1989, c. 585, codified at 38 M.R.S.A. § 2101-2236 (West Supp. 1993) reproduced in pertinent part herein) also set forth a hierarchy of solid waste management which favors incineration of solid waste over its disposal in landfills. *See* 38 M.R.S.A. § 2101 (West Supp. 1993). It also establishes the state's goal to recycle 25% of the municipal solid waste generated each year by January 1, 1992 and 50% by

The preamble to the replacement Flow Control Ordinance demonstrates these two purposes for its adoption: the fourth paragraph concludes that "the Town of Gray wishes to encourage reduction, recycling and reusing [of solid waste] to the maximum extent possible," and the seventh paragraph states the Town Council's desire "to provide adequate, efficient service and facilities for the disposal of solid waste without creating an undo [sic] financial burden on property owners." Pet. App. 47a-48a. Also, the sixth paragraph of the preamble sets forth the underlying purpose for both the Flow Control Ordinance and the RWS waste-to-energy management system: "The Council desires to gain management control over solid waste and enable the reclamation of resources, including energy, from those wastes." Pet. App. 48a. The Flow Control Ordinance, in Sections III(A) and (C), IV, VI(E), and VII(D), (G) and (H), also requires all waste generated in the Town to be delivered to the Facility (either directly or through the Town's transfer station), and also requires recyclable waste separated from other solid waste by commercial haulers to be delivered to the Town's transfer station. Pet. App. 55a-62a.

B. Proceedings Below.

Respondents Tri-State Rubbish, Inc. ("Tri-State") and Recyclables Unlimited Services, Inc. ("RUSI") objected to the Flow Control Ordinance's provisions for the following reasons: (1) commercial haulers had to dispose of all solid waste generated in the Town at RWS at their own expense, and (2) all recycling had to be conducted through the Town. Respondent Tri-State, which is the entity actually collecting and disposing of solid waste in the Town, alleged in a Verified Complaint signed by its President, Guy Hart, that it transported the recyclable materials collected within the Town to RUSI—a corpora-

---

January 1, 1994, and imposes a financial penalty on municipalities that fail to make reasonable progress toward this goal. 38 M.R.S.A. §§ 2132(1), 2204 (West Supp. 1993).

tion also headed by Guy Hart—which operates a waste facility in the town of West Paris, Maine. There, RUSI allegedly separated recyclable materials for recovery, processing and sale and then transported the residual solid waste to a waste-to-energy incinerator facility in Maine other than RWS with a tipping fee lower than that charged by RWS.

Respondents filed their Verified Complaint in the Maine Superior Court, seeking: (1) a declaratory judgment that the Flow Control Ordinance violates the Commerce Clause of the U.S. Constitution, denies equal protection of the laws afforded under the state and federal constitutions, results in impairment of contract and violates both state and federal antitrust laws; (2) preliminary and permanent injunctive relief requiring the Town to pay the tipping fees that Respondents now must pay for use of the RWS Facility and to allow Respondents to process and sell recyclable materials; and (3) damages, attorney's fees and costs under state and federal civil rights statutes. Respondents also filed a separate motion for preliminary and permanent injunction.

Petitioner Town filed with its Amended Answer a three-count Counterclaim alleging the following violations of the Flow Control Ordinance by the Respondents: (1) failure to obtain a commercial hauler's license, (2) diversion of recyclable materials, and (3) diversion of solid waste. Petitioner Town filed a motion for summary judgment on all its counterclaims and Petitioner RWS moved to intervene. The Superior Court, after a hearing on all pending motions, approved RWS' intervention, granted Petitioners' motion for summary judgment on their counterclaims, denied Respondents' cross-motion for summary judgment, and entered judgment instead for Petitioners on all counts of the Verified Complaint. Pet. App. 8a-10a.

At the hearing on these motions, the Superior Court noted the traditional role of municipalities in providing

solid waste management services and denied the Respondents' Commerce Clause claim:

> . . . I begin with the proposition that this area of solid waste has been traditionally, for decades, an area where the municipality has had a great deal of authority to regulate, and to regulate in ways that have traditionally been monopolistic. I recently looked at some very old Maine cases going back to the turn of the century, where some of the very same arguments that you're raising now were raised about the authority of the town to basically grant a monopoly to a private enterprise to deal with offal and swill, as they called it then. And the Law Court was very clear that, in the town's exercise of its police power, that it could, in effect, grant a monopoly to a business to carry out the function of disposing of the offal and the swill.
>
> . . .
>
> In terms of the commerce clause issues, I just—I mean, I recognize the grand scope of the commerce clause, and I'm reluctant to say that what the Town is doing does not have some effect on interstate commerce. But I can't imagine that what the Town is doing is having such an effect on interstate commerce that it violates applicable constitutional standards. The point is, again, that it does require, to some extent, that they control the destination of the waste. And in that sense, yes, it restricts the free flow of commerce, taking the view, as you have, correctly, that waste is a commodity. Clearly, it is. And I believe, for all the reasons I've already stated, they can control the destination of that waste, and they're doing it for perfectly legitimate and rational reasons.

Pet. App. 37a-38a.

Respondents then appealed to the Maine Supreme Judicial Court, sitting as the Law Court (the "Law Court"). The Law Court affirmed the Superior Court's decision as to all issues except the Respondents' Commerce Clause

claim.[8] With regard to the Commerce Clause claim, the Law Court held that there existed a genuine issue of material fact, and ordered the case remanded to the Superior Court. However, it also held that the Flow Control Ordinance is not *per se* invalid under the Commerce Clause and:

> Rather, [that] Gray's Ordinance appears to pursue legitimate local goals, by gaining control of the waste stream and promoting recycling and energy recovery. The Ordinance, however, has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line. *Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641, 645 (D. Minn. 1992). Gray and RWS must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable. (citations omitted.

Tri-State Rubbish, Inc., et al. v. Town of Gray, No. CUM-93-45, Decision No. 6654, slip op. at 6 (Me. Oct. 15, 1993). Pet. App. 6a.

This Petition challenges the Law Court's holdings: (1) that the Flow Control Ordinance has a discriminatory effect on interstate commerce, (2) that Petitioners bear the burden of showing that reasons for the Flow Control Ordinance exist other than economic protectionism and that reasonable alternatives are unavailable, and (3) that the dormant Commerce Clause is applicable to the Flow Control Ordinance. These issues of law are raised now because they directly affect the conduct of proceedings on remand.

---

[8] *Tri-State Rubbish, Inc. v. Town of Gray*, No. CUM-93-45, Decision No. 6654 slip op. at 4 (Me. Oct. 15, 1993). Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

This case involves a challenge to the long-standing authority, and in this case, the obligation, of municipalities to provide for solid waste disposal pursuant to municipal police powers. For reasons stated in this Petition, the Flow Control Ordinance is valid under the Commerce Clause, either because the Commerce Clause is inapplicable to it or because if applicable, it withstands scrutiny under the appropriate test; these reasons support the granting of the writ of *certiorari*.

First, principles of federalism and the actions of Congress in the area of solid waste management policy demand that the Town (as well as state and local governments in general) have broad authority and discretion to provide for and finance solid waste management facilities. A fundamental inquiry here that is separate from the dormant Commerce Clause analysis applied below, but which concerns the scope of the Commerce Clause (an inquiry that has received little attention from reviewing courts), is the role of federalism in the context of local, regional and state long-term, integrated solid waste management programs. Congress has defined the federal/state relationship for Tenth Amendment purposes through federal legislation and has left to state and local governments the primary responsibility for comprehensive planning for solid waste management. State and local governments, which must prepare and implement solid waste management plans, may do so without the restraint of the dormant Commerce Clause.

Second, "flow control" laws and ordinances that have been enacted under a town's police powers to carry out these responsibilities recently have come under attack as violating the dormant Commerce Clause. Lower courts are deeply divided on the outcome of this issue. Petitioners assert that it is questionable whether the dormant Commerce Clause analysis is applicable at all to cases such as the instant case. To the extent that the dormant

Commerce Clause does apply, however, conflicts among the lower courts regarding this issue urgently require resolution. In light of this division among the courts, proceeding to trial on remand from the Law Court in this case presents a great difficulty to the Town and RWS, since it is unclear what they must show to meet their burden of proof; hence, this Court's resolution of the issue is necessary.

Third, this case presents a different factual situation from one recently heard by this Court—this case not only more readily lends itself to addressing the central issue of the constitutional validity of flow control ordinances and the ability of towns to enforce them, but also presents more compelling reasons for upholding a flow control ordinance in the face of a Commerce Clause challenge. This Court recently heard argument in *Town of Clarkstown v. C.A. Carbone, Inc.*, 587 N.Y.S.2d 681 (1992), *cert. granted*, 126 L.Ed.2d 369, 62 U.S.L.W. 3334, a case addressing the ability of a town to direct the processing of solid waste to a transfer station designated by the town. Here, the Flow Control Ordinance, by contrast, more squarely addresses a local government's ability to enforce a long-term, integrated solid waste disposal management plan for all residential and commercial solid waste generated within the Town.

In sum, granting a writ of *certiorari* in this case would allow the Court to clarify the Commerce Clause issue raised when a town exercises its statutory responsibility and police power authority to implement a plan of long-term solid waste management.

I. PRINCIPLES OF FEDERALISM DEMAND THAT THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE BE EXEMPT FROM THE REACH OF THE COMMERCE CLAUSE.

The principles of federalism and democratic self-governance articulated by the Court in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985),

require that the Town be able to adopt and enforce its Flow Control Ordinance, free from constraints or prohibitions that might be imposed by the Commerce Clause.

In *Garcia,* the Court overruled *National League of Cities v. Usery,* 426 U.S. 823 (1976), which stood for the proposition that Congress is not authorized by the Commerce Clause to enforce certain provisions of the Fair Labor Standards Act ("FLSA") against state governments "in areas of traditional governmental functions." *Id.* at 852. Characterizing the "traditional governmental function" test as "not only unworkable but . . . also inconsistent with established principles of federalism . . .", the Court observed in *Garcia* that:

> The essence of our federal system is that within the realm of authority left open to them under the Tenth Amendment to the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.

Garcia, 496 U.S. at 546. The Court then held that it is the federal political process which has the role of preserving the state's interests and defining when the states will be free from the reach of the Commerce Clause:

> But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the states will not be promulgated.

Id. at 556. Therefore, because the Court perceived that nothing in the FLSA's overtime and minimum-wage provisions was "destructive of state sovereignty or violative of any constitutional provision," the Court held that the national political process had protected the state (and local) government from the burden of application, under the Commerce Clause, of the FLSA to the San Antonio

Metropolitan Transit Authority ("SAMTA") employees. *Id.* at 554-556.

Application of the federalism test of *Garcia* to the instant case compels the conclusion that the Flow Control Ordinance is beyond the scope of the limitations of the Commerce Clause and therefore of the implied limitations of the dormant Commerce Clause. Although there is federal legislation in the area of solid waste management, this legislation directly places responsibility for solid waste management on state and local governments. In the Resource Conservation and Recovery Act of 1976 ("RCRA"), Congress specifically found that "the collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies."[9] 42 U.S.C.A. § 6901(a)(4) (West 1983). Thus, the national political process—through Congress—has reserved to state and local governments the authority to determine the manner in which they will meet solid waste management obligations.

The principles of federalism and democratic self-governance enunciated by the Court in *Garcia* thus re-

---

[9] This Congressional finding is consistent with the traditional role of local governments in solid waste collection and disposal. This Court has recognized since early in this century that solid waste disposal and collection is a proper municipal function generally "performed or franchised by the local municipality." O'Reilly, *State & Local Government Solid Waste Management* § 1:03 at 7. *See also* 7 McQuillin, *The Law of Municipal Corporations* § 24.242 at 116 and § 24.245 at 125 (3rd ed.); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); *Hybud Equipment Corp. v. City of Akron, Ohio*, 654 F.2d 1187, 1193 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1981) (referring to *California Reduction Co.* and *Gardner*, the court observed that "[t]he old cases are not anachronisms."). Given this history, the Town's authority over solid waste collection and disposal and the adoption and enactment of the Flow Control Ordinance surely would constitute a "traditional governmental function" excluded from the scope of the Commerce Clause under the *National League of Cities* standard rejected by the Court in *Garcia*.

quire the Court to uphold the Flow Control Ordinance. The Flow Control Ordinance represents a valid exercise of police power by the Town pursuant to state flow control enabling legislation (38 M.R.S.A. § 1304-B) (West 1989 and Supp. 1993) to promote the health, safety and welfare of the Town's citizens. The Flow Control Ordinance also is consistent with the Town's home rule authority, pursuant to the Constitution of Maine and a Maine statute, to enact police power ordinances. *See* Me. Const., art. VIII, pt. 2, sec. 1, and 30-A M.R.S.A. § 3001 (West Supp. 1993); *School Committee of Town of York v. Town of York*, 626 A.2d 935, 938-39 (Me. 1993) (recognizing the Maine Legislature's intent in enacting 30-A M.R.S.A. § 3001 (West Supp. 1993) "to convey a plenary grant of the state's police power to municipalities, subject only to express or implied limitations.") Where the national political process has expressly reserved the responsibility to manage solid waste to state and local governments, the decisions of state and local voters regarding the appropriate manner of solid waste management and its financing must be held to be beyond the scope of the Commerce Clause.

II. THE COMMERCE CLAUSE IS INAPPLICABLE TO THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE.

For several reasons, the Commerce Clause should not be applied to the Flow Control Ordinance. Congress has enacted legislation that explicitly or implicitly authorizes local flow control ordinances, the Flow Control Ordinance is not the type of activity against which the Commerce Clause is intended to protect and the Flow Control Ordinance does not impermissibly interfere with interstate commerce. Each of these reasons is stated more fully below.

The dormant Commerce Clause analysis applies only to restrict state and local legislation where Congress has not addressed a given subject. Congress has acted with

regard to flow control, however, by enacting RCRA, which implicitly authorizes local flow control ordinances. The pertinent provision of RCRA, 42 U.S.C.A. § 6943(a)(5) (West 1983), explicitly recognizes the ability of state and local governments to enter into long-term contracts for solid waste disposal. The authority to so contract would be meaningless without flow control authority. Flow control ordinances in furtherance of this contract authority must be held authorized under § 6943(a)(5) as well—otherwise, the statute would be deprived of its utility and meaning.

RCRA at least implicitly authorizes local governments to enact flow control ordinances that might otherwise impermissibly interfere with interstate commerce. Congress enacted RCRA in 1976 in recognition of the growing solid waste crisis in this country. Under RCRA, responsibility for managing and solving this crisis is placed squarely on the shoulders of state and local governments. 42 U.S.C.A. § 6901(a)(4) (West 1983). In the face of a Congressional mandate reserving this authority to state and local governments, state and local legislation enacted to further Congress' will does not run afoul of the Commerce Clause.

After 1976, states therefore began to enact a variety of comprehensive, integrated solid waste management plans to provide long term solutions to the solid waste crisis. At least 26 states now have passed statutes that both enable and obligate local governments to control the disposal of municipal solid waste.[10] No longer is "out-of-

---

[10] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406 (31)); Florida (Fla. Stat. Ann. § 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. ch. 65, para. 5/11-19-1); Indiana (Ind. Code §§ 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, 1304-B(2)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann.

sight, out-of-mind" a sufficient or acceptable method of dealing with solid waste. As community after community began to discover the hazards that result from improper landfills polluting groundwater, as space for landfills decreased dramatically and as regulations for licensing new ones concomitantly increased, states began to take seriously their obligation regarding solid waste disposal and undertook to develop long-term plans for this purpose.[11] Much of the legislation passed at the state level delegates both the authority and the responsibility for solid waste management to local governments. Some of the statutes also encourage and enable planning and disposal to occur on a regional basis.

Enabling a local government to direct the flow of municipal solid waste generated within that town serves multiple purposes, all of which relate back to that town's and ultimately that state's obligation for long-term, integrated solid waste management planning. Those purposes include advancing the health, safety and environmental welfare of the town's citizens by: (1) allowing the town to manage the entire municipal solid waste stream; (2)

---

§§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2003a, 2203b); Virginia (Va. Code Ann. § 15.1-28-01); Washington (Wash. Rev. Code § 36.58.040, 35.21.210); West Virginia (W. Va. Code § 16-26-16); Wisconsin (Wis. Stat. § 159.13(3), (11)).

[11] Congress recognized these hazards of solid waste landfills when it amended RCRA in 1984 to add the following finding with regard to the environment and health:

> Alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken. 42 U.S.C.A. § 6901 (b)(8) (West Supp. 1993).

allowing the town to guarantee sufficient waste to enter into long-term agreements for waste-to-energy facilities; (3) creating a solid waste management system that is more environmentally sensitive and advanced; (4) avoiding the potentially adverse environmental impacts associated with landfilling all municipal solid waste; and (5) achieving significant waste reduction by the waste-to-energy process.

The resulting flow control ordinances therefore are grounded in the authority that was reserved to the states by Congress through RCRA and primarily address the health, safety, and environmental welfare of each town's and state's citizens. To implement this delegation of authority, Maine enacted legislation in 1983 to authorize flow control ordinances and enacted legislation in 1987 to codify an integrated state solid waste management plan that relies primarily upon regional and municipal management of solid waste efforts. The Flow Control Ordinance here is the product of this federal law, state delegation and municipal home rule; as such, it is exempt from the reach of the Commerce Clause.

In addition, the activities governed by the Flow Control Ordinance do not fall into any of the categories disfavored under Commerce Clause jurisprudence.[12] The restrictions

---

[12] The Town's Flow Control Ordinance does not implicate Commerce Clause concerns that are raised in a number of other cases including: 1) a state or political subdivision isolating itself from economic problems experienced elsewhere in the country, *e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); 2) quarantines imposed by states to protect an in-state industry from products in interestate commerce, *e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986); 3) preference for in-state economic interests over out-of-state competitors, *e.g.*, *Philadelphia v. New Jersey, supra*; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. ——, 112 S.Ct. 2019 (1992); 4) hoarding a resource, *e.g.*, *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991); 5) discrimination against competitors from other states with products in interstate commerce, *e.g.*, *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333 (1977); 6) imposing burden-

of the Commerce Clause should therefore not be applied to the Flow Control Ordinance for this reason as well.

Finally, the Flow Control Ordinance seeks only to plan for and manage solid waste generated within the Town. Unlike the laws at issue in *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. ——, 112 S.Ct. 2019 (1992), and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Flow Control Ordinance neither excludes waste generated in other municipalities nor discriminates against other out-of-town or out-of-state interests. Rather, the Town has designated RWS as the facility to which solid waste generated in the Town must be delivered. RWS is part of an integrated solid waste management plan to dispose of solid waste, generate electricity through the incineration of the waste, and provide for recycling and other waste management activities.

III. IF THE COMMERCE CLAUSE DOES NOT APPLY TO THE TOWN'S FLOW CONTROL ORDINANCE, THE LESSER STANDARD OF SCRUTINY UNDER *PIKE v. BRUCH CHURCH* IS THE APPROPRIATE TEST.

As noted previously, the Law Court concluded that while the Flow Control Ordinance does not facially discriminate against out-of-state interests and so is not *per se* invalid, it nevertheless has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing state lines. *Tri-State Rubbish, Inc. v. Town of Gray*, No. CUM-93-45, Decision No. 7754, slip op. at 6 (Me. Oct. 15, 1993). Pet. App. 6a. Therefore, the Law Court ap-

---

some and conflicting regulations upon businesses involved in commerce in multiple states, *e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and 7) burdensome registration and inspection requirements, *e.g., Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 977 (1993); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993).

parently has determined that the appropriate test to be applied by the Superior Court on remand is the "strict scrutiny" test cited in *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977). This test places upon the Town and RWS the burden to show valid reasons for the Flow Control Ordinance other than economic protectionism and the unavailability of reasonable alternatives.

The Law Court did not discuss how such discrimination manifests itself and indeed no such discrimination does exist. In fact, those subject to the Flow Control Ordinance pay a tipping fee at RWS that generally is higher than that charged by a nearby in-state incineration facility or by an out-of-state landfill; this is the result of the Town's decision to provide a solid waste disposal facility—the Facility—that is preferred by Maine to the landfilling of municipal solid waste (or the result of some waste-to-energy facilities obtaining more favorable contracts for sale of electricity). *See* 38 M.R.S.A. § 2101 (West Supp. 1993) (establishing the state hierarchy of solid waste disposal methods preferring incineration to land disposal of waste.) This Court has held, in the context of state highway safety regulations, that where those subject to a law challenged under the Commerce Clause bear an increased burden because of the law, their economic interest serves as a check against economic protectionism or discrimination against out-of-state interests. *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 675 (1981). With regard to the instant issue of validity of a solid waste flow control ordinance under a Commerce Clause challenge, the Third Circuit has upheld a flow control ordinance adopted in connection with a New Jersey county's transfer station, explaining, "[I]t is precisely the evident fact that the [flow control] Rule places the burden on alleviating the garbage problem upon New Jersey residents that makes this case unlike *Philadelphia v. New Jersey.*" *J. Filiberto Sanitation, Inc. v. Dept. of Envtl. Protection,* 857 F.2d 913,

921-922 (3rd Cir. 1988). The Flow Control Ordinance does not discriminate, but rather regulates even-handedly with regard to all solid waste generated within the Town; therefore if the Commerce Clause applies to this case, it should be analyzed under the lesser standard of scrutiny delineated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[13]

Under the *Pike* balancing test, it is evident that any burden on interstate commerce created by the Flow Control Ordinance is incidental. In addition, any burden that is found to exist is far outweighed by the multiple benefits conferred by the Flow Control Ordinance referred to above. Moreover, the Flow Control Ordinance is not an example of economic protectionism, both because the economic aspect of designating a facility for receipt of all municipal solid waste is only one small factor within a larger comprehensive solid waste management plan and because RWS was created as an outgrowth of statutory mandates to manage the solid waste crisis, not as an indigenous industry that would require economic protection.

Insuring the long-term economic viability of RWS is only one factor that is considered by the Flow Control Ordinance. This one factor is only a component part in

---

[13] Even if the Flow Control Ordinance is deemed to "discriminate" against interstate commerce as opposed to presenting an incidental burden upon it, this Court has stated that not all discrimination is impermissible and that states may regulate matters of "legitimate local concern." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (*citing Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). In addition, this Court has also "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) ("a State's power to regulate commerce is never greater than in matters traditionally of local concern."); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (states "retain authority under their general police powers to regulate matters of 'legitimate local concern', even though interstate commerce may be affected").

the integrated solid waste management plan. The other health, safety and environmental welfare factors make it clear that the purposes behind both the state legislation and the Flow Control Ordinances are far broader than assuring the economic viability of a single facility that is owned by the Member Municipalities.

The Law Court therefore either should have upheld the grant of summary judgment by the Superior Court outright, or should have applied the lesser standard of scrutiny outlined in *Pike v. Bruce Church, Inc.* and upheld the Flow Control Ordinance.

IV. LOWER COURTS ARE DEEPLY DIVIDED ON WHETHER THE COMMERCE CLAUSE ALLOWS MUNICIPALITIES TO TAKE RESPONSIBILITY UNDER THEIR POLICE POWERS FOR LONG-TERM PLANNING OF SOLID WASTE MANAGEMENT.

Courts representing all geographic regions of the country have ruled on this issue with strikingly different results. Several state and federal courts have upheld solid waste flow control ordinances. The Sixth Circuit has done so in a case that provides the touchstone analysis for those cases ruling favorably on this issue. *See Hybud Equip. Corp. v. City of Akron,* 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 104 (1985). In addition, the Third Circuit affirmed the use of police power to direct the flow of solid waste in *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envtl. Protection,* 857 F.2d 913 (3rd Cir. 1988). The *Town of Clarkstown* decision, 587 N.Y.S.2d 681 (1992), *cert. granted,* 126 L.Ed.2d 369, 62 U.S.L.W. 3334, upheld the ability of a town to plan for long-term solid waste disposal. Similarly, the courts in *In re Fiorillo Bros.,* 577 A.2d 1316, *cert. denied,* 585 A.2d 371 (1990), and *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.,* 600 F.Supp. 1369 (D. Del. 1985), also upheld a

local government's ability to plan and control solid waste disposal.

There also are several courts which have invalidated local flow control ordinances. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F.Supp. 1566 (M.D. Ala. 1993), and *Container Corp. of Carolina v. Mecklenburg County*, No. 92 Cv-154-MV (W.D.N.C. June 14, 1992) (granting preliminary injunction); *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1991). However, Petitioners assert that these were wrongly decided because in some of these cases, a strict scrutiny standard was erroneously applied, and because in others, the facts of these cases are distinguishable from those of the instant case.

The central issue in an analysis of the validity of the Flow Control Ordinance should be whether a local government's police power authority includes the authority to regulate disposal of solid waste generated within its borders for the purpose of municipal solid waste management. The Flow Control Ordinance provides this Court with an ideal opportunity to decide this issue. The Flow Control Ordinance was enacted precisely because of federal law and state mandates and enabling legislation obligating the Town to act precisely as it did: to develop an ordinance that would be a component part of a comprehensive, long-term, solid waste management plan. The Flow Control Ordinance and its user-based financing system is a valid police power enactment because it permits the Town to implement an environmentally sensitive and advanced method of long-term solid waste management. Therefore, the Commerce Clause issue should be resolved, and it should be resolved in favor of local governmental authority over solid waste management.

V. THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE PRESENTS A MORE COMPELLING CASE TO UPHOLD SUCH AN ORDINANCE THAN DOES THAT OF CLARKSTOWN.

The Flow Control Ordinance presents a more compelling factual scenario than that described in the decision in *Town of Clarkstown,* 587 N.Y.S.2d 681 (1992), *cert. granted,* 126 L.Ed.2d 369, 62 U.S.L.W. 3334, on this issue. First, the Flow Control Ordinance facilitates the operation of a major, region-wide solid waste management facility—not only a transfer station. Second, the Facility was constructed and the Flow Control Ordinance enacted pursuant to a state mandate *requiring* the provision of a disposal facility. *See* 38 M.R.S.A. § 1305(1) (West 1989). Third, the Flow Control Ordinance at all times has been authorized by state statutes enabling flow control ordinances and requiring towns to make reasonable efforts to meet state recycling goals. *See* 38 M.R.S.A. §§ 1304-B, 2132 and 2204 (West 1989 and Supp. 1993). In addition, here, there was an extensive feasibility study of solid waste management alternatives undertaken prior to the construction of the Facility.[14] Finally, financing of the Facility was predicated on the requirement that flow control laws be enacted by each Member Municipality.

---

[14] *See* note 5, *supra.*

CONCLUSION

For the reasons stated above, this Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MERTON G. HENRY
Counsel of Record
NICHOLAS S. NADZO
JAMES N. KATSIAFICAS
EMILY A. BLOCH
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271
Counsel for Petitioners